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## 18.1 Court Rules and Statutes Governing Trials of Designated Cases

MCR 5.954 states that trials of designated cases are governed by Subchapter 6.400 of the Michigan Court Rules, except for MCR 6.402(A).<sup>\*</sup> Subchapter 6.400 governs the procedures for criminal cases.

In addition, MCL 712A.17(2); MSA 27.3178(598.17)(2), provides that the summoning and impaneling of jurors shall be governed by Chapter VIII (Trials) of the Code of Criminal Procedure (MCL 768.1 et seq.; MSA 28.1024 et seq.).

<sup>\*</sup>See Section 18.4, below, for a discussion of waiver of the right to jury trial in designated cases.

## 18.2 Right to Trial by Jury or by Court

A criminal defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury. MCR 6.401 and MCL 763.3; MSA 28.856.<sup>\*</sup>

<sup>\*</sup>See Form MC 260.

A defendant's constitutional rights to trial by jury are contained in Const 1963, art 1, § 20, and US Const, Am VI. However, a criminal defendant has no constitutional or substantive right to insist upon a nonjury trial. *People v Kirby*, 440 Mich 485, 494 (1992) (requiring consent of prosecutor to waiver of jury trial does not violate due process).

Under the Michigan Constitution, the right to a jury trial applies in both felony and misdemeanor cases. *People v Harris*, 45 Mich App 217, 218–19 (1973).

### 18.3 Judges Who May Preside at Trials of Designated Cases

MCR 5.912(A)(1)(a) and (b) require a judge to preside at a trial by jury and a nonjury trial in a designated case. The judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause was waived. However, the judge who presides at a preliminary examination may accept a plea in the designated case. MCR 5.912(A)(2).

### 18.4 Waiver of the Right to Jury Trial in Designated Cases

\*See Form MC 260.

A criminal defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive\* that right and be tried before the court without a jury. MCR 6.401 and MCL 763.3; MSA 28.856.

In designated cases, the court may not accept a waiver of trial by jury until after the juvenile has been offered an opportunity to consult with a lawyer. MCR 5.954.

**NOTE:** In delinquency cases, a jury trial is automatically waived unless the juvenile makes a demand for a jury trial. See Section 9.2.

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. MCR 6.402(B).

The waiver procedure in MCR 6.402(B) differs from that contained in MCL 763.3(2); MSA 28.856(2), which requires a writing signed in open court by the defendant. The statute has been superseded by the court rule. *People v James*, 184 Mich App 457, 464 (1990).

## 18.5 Findings of Fact and Conclusions of Law by Judges in Nonjury Trials

When trial by jury has been waived, the court with jurisdiction must proceed with the trial. The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. MCR 6.403.

The judge must articulate his or her decision in findings of fact which are specific enough to disclose the basis for each critical determination made at trial. *People v Jackson*, 63 Mich App 249, 250–54, and MCR 2.517(A). The purpose of these factual findings is to aid appellate review. *People v McKeever*, 123 Mich App 533, 535–36 (1983). A judge is not required to make findings on every element of the crime. Findings simply must indicate that the judge was aware of the factual issues and applied the law correctly. *People v Wardlaw*, 190 Mich App 318, 320–21 (1991).

## 18.6 Speedy Trial Requirements

### A. Statutory Right to Speedy Trial

The state and a criminal accused have a statutory right to a speedy trial. MCL 768.1; MSA 28.1024.

**NOTE:** MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides. However, the juvenile whose case is designated “is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction.” MCR 5.903(D)(9). See also MCL 712A.2d(7); MSA 27.3178(598.2d)(7). Subchapter 5.900 does not incorporate by reference the court rule governing the right to speedy trial in criminal cases, MCR 6.004.\*

In a felony case in which the defendant has been incarcerated for a period of 6 months or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance. In a misdemeanor case, the period is 28 days. MCR 6.004(C).

\*See Section 16.1 for a list of the court rules referenced in MCR 5.951–5.956, dealing with designated proceedings.

### B. Constitutional Right to Speedy Trial

A criminal accused has a constitutional right to a speedy trial. US Const, Am VI, and Const 1963, art 1, § 20. The constitutional speedy trial guarantee does not attach until the defendant becomes an accused; there is no Sixth Amendment right to be arrested. *United States v Lovasco*,

431 US 783; 97 S Ct 2044; 52 L Ed 2d 752 (1977), and *People v Grimmett*, 388 Mich 590, 602 (1972).

In determining whether defendant's constitutional right to a speedy trial has been violated, the following factors must be balanced:

- F the length of the delay;
- F the reasons for the delay;
- F whether defendant has asserted her or his right; and
- F whether defendant has been prejudiced by the delay.

*Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972), and *People v Grimmett*, 388 Mich 590, 606 (1972). See, generally, *People v Harris*, 110 Mich App 636, 645–48 (1981).

The length of delay is the triggering mechanism for consideration of other factors in a speedy trial analysis. *People v Collins*, 388 Mich 680, 688–89 (1972).

Prejudice to defendant's ability to rebut the charge is the most important consideration in determining whether the right has been violated. *People v Grandberry*, 102 Mich App 769, 774 (1980). Prejudice to the defendant is presumed where the pretrial delay exceeds 18 months. *People v Grimmett*, 388 Mich 590, 606 (1972), citing *People v Den Uyl*, 320 Mich 477 (1948).

### C. Victim's Right to Speedy Trial\*

MCL 780.786a(1)(a)–(d); MSA 28.1287(786a)(1)(a)–(d), of the Juvenile Crime Victim's Rights Act state that a speedy trial may be scheduled for any case in which the victim is declared by the prosecuting attorney to be:

- (a) a victim of child abuse, including sexual abuse or any other assaultive crime;
- (b) a victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration or to commit criminal sexual conduct in the second degree;
- (c) sixty-five years of age or older; or
- (d) an individual with a disability that inhibits the individual's ability to attend court or participate in the proceedings.

Upon motion of the prosecuting attorney for a speedy trial in a case involving any of the victims described above, the court must set a hearing date within 14 days after the motion is filed, with notice made pursuant to the Michigan Court Rules.\* If the motion is granted, the trial

\*See Sections 18.21, below, and 20.6, Note, for discussion of the applicability of the JCVRA to designated proceedings.

\*See Section 8.5 (notices of hearings).

shall not be scheduled earlier than 21 days from the date of the hearing. MCL 780.786a(2); MSA 28.1287(786a)(2).

## 18.7 Requirements for Adjournments, Continuances or Delays

A motion for adjournment, continuance, or delay must be based on good cause shown in the manner provided by law for the trial of civil cases. MCL 768.2; MSA 28.1025.

MCL 768.2; MSA 28.1025, further provides that an adjournment may be granted only if the reasons for delay are founded on strict necessity and a trial cannot be had without a manifest injustice being done. The “sufficient showing” must be placed on the record.

In deciding whether or not to grant a defendant’s motion for adjournment, the trial court should consider whether:

- F the defendant is asserting a constitutional right;
- F the defendant has a legitimate reason for asserting the right;
- F the defendant is not guilty of negligence;
- F the defendant has not caused prior adjournments.

*People v Wilson*, 397 Mich 76, 81 (1976), and *People v Hill*, 88 Mich App 50, 56–58 (1979) (court applies factors listed above in a case where an alibi defense was asserted).

## 18.8 Number of Jurors

MCR 6.410(A) states that, except as provided by this rule, a jury that decides a case must consist of 12 jurors.

At any time before a verdict is returned, the parties may stipulate with the court’s consent to have the case decided by a jury consisting of a specified number that is less than 12 jurors. On being informed of the parties’ willingness to stipulate, the court must personally advise the defendant of the right to have the case decided by a jury of 12 jurors. By addressing the defendant personally, the court must ascertain that the defendant understands the right and voluntarily chooses to give up the right as provided in the stipulation. If the court finds that the requirements for a valid waiver have been satisfied, the court may:

- F accept the stipulation, or
- F in the interest of justice, refuse to accept a stipulation, but it must state its reasons for doing so on the record.

The stipulation and related procedure must take place in open court, and a verbatim record must be made. MCR 6.410(A).

The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The jurors eliminated by this process are to be discharged after the jury retires to deliberate. MCR 6.411 and MCL 768.18; MSA 28.1041 (jury of 14 impanelled to try a felony case).

## **18.9 Selecting and Impaneling the Jury**

MCR 6.412(A) incorporates all of the provisions of the general rules for civil cases on impaneling the jury (MCR 2.511) and rendering the verdict (MCR 2.512), unless otherwise specifically provided in Subchapter 6.400.

MCR 6.412(B) provides that before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn. MCL 768.14; MSA 28.1037, provides the oath to which jurors must swear or affirm. Appropriate preliminary instructions and the oath are found in the Michigan Criminal Jury Instructions.

## **18.10 Voir Dire of Jurors**

The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process. MCR 6.412(C)(1).

The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors. MCR 6.412(C)(2).

## **18.11 Challenges of Jurors for Cause**

Under MCR 6.412(D)(1), a prospective juror is subject to challenge for cause on any ground set forth in MCR 2.511(D), or for any other reason recognized by law. A prospective juror may be challenged for cause if he or she:

- (1) is not qualified to be a juror;
- (2) has been convicted of a felony;
- (3) is biased for or against a party or attorney;

(4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;

(5) has opinions or conscientious scruples that would improperly influence the person's verdict;

(6) has been subpoenaed as a witness in the action;

(7) has already sat on a trial of the same issue;

(8) has served as a grand or petit juror in a criminal case based on the same transaction;

(9) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;

(10) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;

(11) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal action;

(12) has a financial interest other than that of a taxpayer in the outcome of the action; or

(13) is interested in a question similar to the issue to be tried.

MCR 2.511(D)(1)–(13).

Previous formation or expression of an opinion or impression, not positive in character, in reference to circumstances of the case or guilt or innocence of defendant, when not based on personal knowledge of the facts, is an insufficient ground for a challenge for cause, provided the juror declares on oath that he or she believes he or she can render an impartial verdict on evidence submitted, and the court is satisfied that the juror can do so. MCL 768.10; MSA 28.1033.

If, after examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel. MCR 6.412(D)(2).

## 18.12 Peremptory Challenges of Jurors

Peremptory challenges are allotted as follows:

**F** for a non-life offense, 5 challenges for each defendant;

**F** for a life offense:

- 12 challenges for a defendant tried alone; or
- 10 challenges for each of two jointly-tried defendants;
- 9 challenges for each of three jointly-tried defendants;
- 8 challenges for each of four jointly-tried defendants;
- 7 challenges for each of five or more jointly-tried defendants.

MCR 6.412(E)(1).

The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly-tried defendants, the total number of peremptory challenges to which all of the defendants are entitled. MCR 6.412(E)(1) and MCL 768.12 and 768.13; MSA 28.1035 and 28.1036.

A defendant charged with more than one offense is entitled to the number of peremptory challenges prescribed for the most serious crime charged. *People v Stram*, 40 Mich App 249, 251–52 (1972).

On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party. MCR 6.412(E)(2).

## 18.13 Conduct of Jury Trials

Subject to the rules in Chapter 6 of the Michigan Court Rules and the Michigan Rules of Evidence, each party has discretion in deciding what witnesses and evidence to present at trial. MCR 6.416.

### A. Court's Duty to Control Proceedings

The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. MCR 6.414(A) and MCL 768.29; MSA 28.1052.

Where error and mistake are egregious, the trial court has a duty, upon proper motion, to declare a mistrial. *People v Spencer*, 130 Mich App 527, 539–43 (1983).



## B. Communications With Jury

The court may not communicate with the jury or with any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record. MCR 6.414(A).

Prejudice arising from ex-parte communication with deliberating jurors is evaluated according to the type of communication involved. Substantive communications (supplemental instructions) carry a presumption of prejudice which may be rebutted by a “firm and definite” showing of a lack of prejudice. Administrative communications (availability of evidence, continuation of deliberations) carry no presumption, and failure to object to such communications indicates a lack of prejudice. Housekeeping communications (meal orders, rest rooms) carry a presumption of a lack of prejudice, which may be rebutted by a “firm and definite” showing of prejudice. *People v France*, 436 Mich 138, 142–44 (1990).

A trial court's comments to the jury during deliberations that implied that the jury would be discharged as deadlocked if they did not reach a verdict by the close of the first day of deliberations were impermissibly coercive. *People v Malone*, 180 Mich App 347, 350–53 (1989). All of the facts and circumstances, as well as the particular language used by the trial judge, must be considered. *Id.*, citing *Zeitz v Mara*, 290 Mich 161 (1939).

## C. Opening Statements

Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable limits on the opening statements. MCR 6.414(B).

## D. Note Taking by Jurors

The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and that, if they do, they should not allow note taking to interfere with their attentiveness. The court must also instruct jurors to keep notes confidential, except as to other jurors, and to destroy their notes when the trial ends. MCR 6.414(C).

## E. Viewing Scene of Material Event

Whenever it deems it necessary, the court may order a jury view of property or a place where a material event occurred. The parties are

entitled to be present at the jury view. During the view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial. MCR 6.414(D) and MCL 768.28; MSA 28.1051.

The defendant has a fundamental right to be present during every stage of the trial where his substantial rights may be affected, including a jury view. However, the defendant may waive this right. *People v Mallory*, 421 Mich 229, 247–48 (1984).

## F. Closing Arguments

After the close of all of the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes a closing argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable limits on the closing arguments. MCR 6.414(E).

## 18.14 Rules of Evidence and Standard of Proof

The Michigan Rules of Evidence apply to criminal proceedings. MRE 1101(a). The prosecuting attorney must prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged. *Mullaney v Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975).

## 18.15 Instructions to Jury

### A. Instructions Requested by the Parties

Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions, which must be served on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. MCR 6.414(F). See also MCL 768.29; MSA 28.1052 (failure of court to instruct on any point of law shall not be ground for setting aside verdict unless such an instruction was requested).

Where the trial court and counsel agreed to a modified jury instruction, on which defense counsel relied and based his closing argument to the jury, and then the trial court decided to give the unmodified jury instruction, the defense was prejudiced and a new trial is required. *People v Clark*, 453 Mich 572, 594 (1996).

Defendant is entitled to instructions supporting his theory of the case, provided there is evidence on the record to support that theory. *People v Hearn*, 100 Mich App 749, 753 (1980), and *People v Maleski*, 220 Mich App 518, 520–22 (1996).

The trial court is obligated to instruct on all elements of the offense. *People v MacPherson*, 323 Mich 438, 446–53 (1949).

## **B. Instructions When Insanity Defense Has Been Asserted**

In a jury trial in which the defendant has asserted an insanity defense, the judge must instruct the jury on the law before testimony is presented on that issue. MCL 768.29a; MSA 28.1052(1). The instruction includes the definitions of mental illness, mental retardation, and legal insanity.

The failure to give a preliminary instruction on insanity does not require automatic reversal. *People v Grant*, 445 Mich 535, 544 (1994).

## **C. Time When Instructions Should Be Given**

After closing arguments are made or waived, the court must instruct the jury as required or appropriate. However, with the parties' consent, the court may instruct the jury before the parties make closing arguments. MCR 6.414(F).

## **D. Use of Standard Criminal Jury Instructions**

Standard Criminal Jury Instructions are prepared by the Michigan State Bar's Standard Criminal Jury Instructions Committee but are not approved by the Michigan Supreme Court before their usage. The Michigan Supreme Court has declined to make use of the standard instructions mandatory. Thus, trial judges are encouraged to examine them carefully before using them, in order to insure their accuracy and appropriateness to the case at hand. *People v Petrella*, 424 Mich 221, 277 (1985).

## **E. Instructions on Lesser-Included Offenses**

The trial court must instruct on necessarily lesser-included offenses when requested to do so. It must instruct on “cognate” lesser-included offenses where such offenses are supported by the evidence, defendant had fair notice that he could be required to defend against such charges, and instruction on such offenses has been requested. *People v Ora Jones*, 395 Mich 379, 388–90 (1975).

The trial court may instruct on a “cognate” lesser-included offense, even over defendant's objection, if (1) the language of the charging document is such as to give the defendant notice that he could at the same time face the lesser-included offense, *People v Chamblis*, 395 Mich 408, 418 (1975), (2) the lesser-included offense is of the same class or category, or so closely related to the originally charged offense as to provide fair notice to the defendant that he will be required to defend against it, *People v Ora Jones*, 395 Mich 379, 388 (1975), and (3) the lesser-included offense is supported by the evidence, *People v Chamblis*, *supra*, at 423.

Where (1) an adequate request for an appropriate misdemeanor instruction has been made, (2) the requested instruction is supported by a rational view of the evidence adduced at trial, (3) there is an inherent relationship between the charged felony and the requested misdemeanor, and (4) giving the requested instruction would not result in a violation of due process, undue confusion, or some other injustice, the judge must give the instruction. *People v Stephens*, 416 Mich 252, 261–65 (1982). The trial judge has “substantial discretion” in determining whether or not to give the requested instruction. *Id.* Otherwise, instructions on lesser-included offenses must not include misdemeanors. *People v Chamblis*, 395 Mich 408, 429 (1975).

## F. Additional Instructions After Deliberations Begin

After jury deliberations begin, the court may give additional instructions as appropriate. MCR 6.414(F).

It is permissible to instruct a deadlocked jury that:

- F in order to return a verdict, each juror must agree to it;
- F jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- F each juror must decide the case for herself or himself, but only after an impartial consideration of the evidence with her or his fellow jurors;
- F in the course of deliberation, a juror should not hesitate to reexamine her or his own views and change her or his opinion if convinced it is erroneous; and
- F no juror should surrender her or his honest conviction as to the weight or effect of the evidence solely because of the opinion of her or his fellow jurors, or for the mere purpose of returning a verdict.

*People v Sullivan*, 392 Mich 324, 334–35 (1974), citing ABA Project on Minimum Standards for Criminal Justice, standards relating to trial by jury [Approved Draft, 1968], Standard 5.4. See also CJI2d 3.12.

A “substantial departure” from ABA Standard 5.4 in instructing a deadlocked jury shall be grounds for reversible error. A “substantial departure” is one which has an undue tendency to coercion, i.e., one which could cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement. *People v Hardin*, 421 Mich 296, 316 (1984).

Whenever the question of the numerical division of the jury is asked from the bench, in the context of inquiry into the progress of deliberation, it carries an improper suggestion that the state of the numerical division reflects the stage of the deliberations and has the doubly coercive effect of melting the resistance of the minority and

freezing the determination of the majority. *People v Wilson*, 390 Mich 689, 692 (1973).

### **G. Jury's Use of Written or Recorded Instructions**

On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the parties agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record. MCR 6.414(G).

## **18.16 Deliberations by the Jury**

### **A. Taking Materials or Evidence Into Jury Room**

The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than a charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. MCR 6.414(G).

### **B. Requests by Jury to Review Testimony or Evidence**

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. MCR 6.414(H).

### **C. Unanimity of Verdict**

The jury verdict must be unanimous. MCR 6.410(B). It is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Liggett*, 378 Mich 706 (1967).

Where the prosecution offers evidence of multiple acts, any one of which would satisfy the elements of the charged offense, the court must instruct that unanimity on a single specific act is required if the acts are materially distinct or there is reason to believe jurors may be confused or may disagree about the factual basis of guilt. Otherwise, a general unanimity instruction is sufficient. *People v Cooks*, 446 Mich 503, 530 (1994).

Where the defendant is charged with alternative counts of premeditated and felony murder, the court should instruct the jury that the verdict must be unanimous as to one or both of the theories. *People v Olsson*, 56 Mich App 500, 505–06 (1974).

A trial court is not required to instruct in a second-degree murder trial that the jury must be unanimous on one of the three alternative theories for the requisite state of mind, as long as the jury is instructed that each juror must find that one of the states of mind existed at the time of the offense. *People v Johnson*, 187 Mich App 621, 628–30 (1991).

## 18.17 Motions for Directed Verdict of Acquittal

### A. Before Submission to Jury

After the prosecutor has presented the prosecution's case-in-chief but before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. MCR 6.419(A).

In deciding a motion for a directed verdict of acquittal, the court must consider the evidence presented by the prosecuting attorney up to the time the motion is made, viewed in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979), and *People v Hampton*, 407 Mich 354, 368 (1979).

If the defendant's motion is made after he or she presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations. MCR 6.419(A).

Where the trial judge held the defendant's renewed motion for a directed verdict in abeyance until the jury reached a verdict and, after the jury found the defendant guilty, ordered a new trial, the judge did not invade the province of the jury by granting a new trial instead of the defendant's motion. *People v Hampton*, 407 Mich 354, 369–74 (1979).

### B. After Jury Verdict

After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial. MCR 6.419(B).\*

### C. Conditional New Trial Rulings

If the court grants a directed verdict of acquittal after the jury has returned a guilty verdict, it must also conditionally rule on any motion for a new trial by determining whether it would grant the motion if the directed verdict of acquittal is vacated or reversed. MCR 6.419(C). See, generally, *People v Bart (On Remand)*, 220 Mich App 1, 5 (1996).

\*See Section 18.19, below, for a discussion of motions for new trials.

## D. Explanation of Rulings on Record

The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for directed verdict of acquittal and for conditionally granting or denying a motion for a new trial. MCR 6.419(D).

## 18.18 Taking the Verdict

A jury verdict must be unanimous. MCR 6.410(B). The jury must return its verdict in open court. MCR 6.420(A).\*

\*See Form JC 70.

Where the accused is charged with alternative theories for conviction on a charged offense, there is no due process right for a jury verdict which specifies either which theory was accepted by the jury or that the jury was unanimous on a particular theory of guilt. *Schad v Arizona*, 501 US 624, 645–46; 111 S Ct 2491; 115 L Ed 2d 555 (1991).

Juries may reach inconsistent verdicts. However, this freedom does not extend to judges sitting as finders of fact. *People v Vaughn*, 409 Mich 463, 466 (1980), *People v Lewis*, 415 Mich 443, 449 (1982), and *People v Burgess*, 419 Mich 305, 310–11 (1984).\*

\*See Section 18.5, above, for a discussion of required findings of fact and conclusions of law by judges.

### A. In Joint Trials With Co-Defendants

If two or more defendants are jointly on trial, the jury at any time during its deliberations may return a verdict with respect to any defendant as to whom it has agreed. If the jury cannot reach a verdict with respect to any other defendant, the court may declare a mistrial as to that defendant. MCR 6.420(B).

### B. Polling of Jury

Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses that the jurors are not in agreement, the court may:

- F discontinue the poll and order the jury to retire for further deliberations, or
- F declare a mistrial and discharge the jury, either
  - with the defendant's consent, or
  - after determining that the jury is deadlocked or that some other manifest necessity exists.

MCR 6.420(C).

Because of the potentially coercive effect of continued polling or comment on the numerical division of the jurors, the court should discontinue the polling as soon as disagreement is disclosed. *People v Wilson*, 390 Mich 689 (1973).

A trial court is not required to inquire as to the status of jury deliberations on included offenses before it declares a mistrial. *People v Hickey*, 103 Mich App 350, 353 (1981).

## C. Verdicts in Designated Cases

### F Not Guilty

\*See Form MC 262.

A verdict of “not guilty” shall serve as a finding that the defendant is not within the provisions of the Juvenile Code, MCL 712A.1 et seq.; MSA 27.3178(598.1) et seq., and the court shall enter an order dismissing the petition. MCL 712A.18(1); MSA 27.3178(598.18)(1).\*

### F Not Guilty by Reason of Insanity

Where an insanity defense has been raised and the jury’s verdict is “not guilty by reason of insanity,” MCL 330.2050(1); MSA 14.800(1050)(1), provides that the court shall immediately commit the person to the custody of the Center for Forensic Psychiatry for a period not to exceed 60 days. The Center for Forensic Psychiatry is to receive a full report from the court in the form of a settled record of the facts of the offense alleged.

### F Guilty but Mentally Ill

If an insanity defense is asserted at trial and the jury finds all of the following beyond a reasonable doubt, the defendant may be found “guilty but mentally ill”:

- (a) The defendant is guilty of an offense.
- (b) The defendant was mentally ill at the time of the commission of that offense.
- (c) The defendant was not legally insane at the time of the commission of that offense.

MCL 768.36(1)(a)–(c); MSA 28.1059(1)(a)–(c).

If the jury verdict is guilty but mentally ill, the court may impose any sentence which could be imposed pursuant to law upon a defendant convicted of the same offense. MCL 768.36(3); MSA 28.1059(3).



## F Guilty

A jury verdict of “guilty” serves as a finding that the defendant is within the provisions of the Juvenile Code, MCL 712A.1 et seq.; MSA 27.3178(598.1) et seq., for the offense and is a conviction. The conviction has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7); MSA 27.3178(598.2d)(7).\*

\*See Form JC 70.

## 18.19 Motions for New Trials

### A. Time Requirements for Filing Motions

MCR 6.431(A)(1) allows the defendant to file a motion for a new trial within 42 days after entry of the judgment. Note that the filing of a motion within this period extends the time for filing the claim of appeal until 42 days after the entry of an order denying the motion for a new trial. MCR 7.204(A)(2)(d).

However, if a claim of appeal has already been filed, typically under MCR 6.425(F)(3),\* a motion for a new trial may only be filed in accordance with MCR 7.208(B), or the remand procedure set forth in MCR 7.211(C)(1). MCR 6.431(A)(2).

\*See Section 20.42 (order appointing counsel as claim of appeal in cases where conviction follows trial).

If the defendant fails to file a timely claim of appeal, the defendant may file a motion for new trial within the time for filing an application for leave to appeal. MCR 6.431(A)(3). MCR 7.205(F)(3) limits the time in which to file an application for leave to appeal to 12 months unless one of the exceptions in MCR 7.205(F)(4) is satisfied.

If the defendant is no longer entitled to an appeal by right or by leave, the defendant may seek relief pursuant to Subchapter 6.500, governing post-appeal relief. MCR 6.431(A)(4).

### B. Court Rule Requirements for Granting Motions for New Trials

MCR 6.431(B) allows a trial court to order a new trial in a criminal case only when a motion has been brought by the defendant. The trial court may not order a new trial sua sponte. *People v McEwan*, 214 Mich App 690, 697 (1995).

The court may order a new trial on any ground that would support appellate reversal of the conviction, or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record. MCR 6.431(B).

**NOTE:** The statute governing motions for new trial, MCL 770.1; MSA 28.1098, uses different language to describe the second ground for granting or denying the motion. Pursuant to the statute, the motion may be granted “when it appears to the court that justice has not been done.” However, this standard has been superseded by that in the court rule. MCR 1.104 and 6.001(E), and *People v Strong*, 213 Mich App 107, 112 (1995).

The court must consider a motion for new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal. MCR 6.431(D).

## C. Case Law Requirements for Granting Motions for New Trials

### F Verdict Against Great Weight of Evidence

In ruling on a motion for new trial on the ground that a jury’s verdict was against the great weight of the evidence presented, “the trial judge does not sit as the thirteenth juror . . . and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, \_\_\_ Mich \_\_\_ (1998), overruling *People v Herbert*, 444 Mich 466 (1993). Unless the testimony of witnesses for the prosecution “contradicts indisputable physical facts or law,” or “is patently incredible or is so inherently implausible that it could not be believed by a reasonable juror,” the trial judge cannot evaluate the credibility of such witnesses when ruling on a motion for new trial. *Lemmon, supra*, at \_\_\_. The newly adopted standard of *Lemmon, supra*, applies prospectively to cases not yet final as of March 24, 1998.

A motion for new trial must be made in the trial court to preserve the issue of whether the conviction is against the great weight of the evidence. *People v Bush*, 187 Mich App 316, 329–30 (1991).

### F Newly Discovered Evidence

The test for granting a new trial based on newly discovered evidence is:

- the evidence itself, not merely its materiality, is newly discovered;
- the evidence is not cumulative;
- the evidence is such as to render a different result probable on retrial; and
- the party offering the evidence could not with reasonable diligence have discovered and produced it at trial.

*People v Mack*, 112 Mich App 605, 614 (1981).

An evidentiary hearing must be held where nonrecord evidence forms the basis for a claim of newly discovered evidence. *People v Burton*, 74 Mich App 215, 222–24 (1977), and *In re Alton*, 203 Mich App 405, 408–10 (1994) (delinquency case).

Newly discovered evidence relating only to the credibility of prosecution witnesses is insufficient to warrant a new trial. *People v McWhorter (On Remand)*, 150 Mich App 826, 834 (1986). Recantation testimony is generally regarded as suspect. *People v Canter*, 197 Mich App 550, 559–62 (1992). But see *People v Mechura*, 205 Mich App 481, 483–85 (1994) (perjury).

## **F Use of Juror Affidavits**

Generally, jurors may not impeach their verdicts by affidavits. However, affidavits or testimony may be received to prove extraneous influences accessible by all jurors, but not matters within the consciousness of a single juror. In cases involving alleged nondisclosure of facts during voir dire, the moving party must present proof of nondisclosure and actual prejudice, or must establish to the satisfaction of the trial court that it would have successfully challenged for cause or otherwise dismissed the juror in question, had the truth been revealed prior to trial. *People v Graham*, 84 Mich App 663, 666–67 (1978). See also *People v Budzyn*, 456 Mich 77, 88–90 (1997) (test for cases involving juror consideration of extraneous facts not introduced into evidence).

## **D. Requirements for Granting Motions Following Bench Trials**

If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment. MCR 6.431(C).

Where conviction follows a bench trial, the trial court's discretion in ordering a new trial is subject to the same standard applied when deciding a motion for new trial following conviction after a jury trial. *People v McEwan*, 214 Mich App 690, 694–95, 698 (1995).

## **E. Harmless Error Test**

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096. See, generally, *People v Mateo*, 453 Mich 203, 214 (1996), and MCR 2.613(A) (error must be inconsistent with substantial justice).

## 18.20 Correcting Mistakes

### A. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party. The court may, in its discretion, give the parties prior notice. MCR 6.435(A).

### B. Substantive Mistakes

After giving the parties an opportunity to be heard, and provided that it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. MCR 6.435(B).

The 1989 Staff Comment following MCR 6.435 defines substantive mistake as “a conclusion or decision that is erroneous because it was based on a mistaken belief in the facts or the applicable law.” Examples of substantive errors are the confusion of codefendants or a sentence in violation of the “*Tanner* rule” (minimum sentence may not exceed two-thirds of statutory maximum sentence). See, generally, *People v McEwan*, 214 Mich App 690, 695 (1995), and *People v Jones*, 203 Mich App 74, 80 (1993).

### C. Corrections of the Record

If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected. MCR 6.435(C).

### D. Corrections Made After Claim of Appeal Is Filed or Leave to Appeal Is Granted

If a claim of appeal has been filed or leave to appeal has been granted, corrections under MCR 6.435 are subject to MCR 7.208(A) and (B). MCR 6.435(D).

MCR 7.208(A) provides that after a claim of appeal is filed or leave to appeal is granted, the trial court may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law. In a criminal case, the filing of the claim of appeal does not preclude the trial court from granting a timely post-judgment motion under MCR 7.208(B).

## 18.21 Crime Victim's Rights in Designated Proceedings

The Juvenile Crime Victim's Rights Act, MCL 780.781–780.802; MSA 28.1287(781)–28.1287(802), applies to juveniles alleged or found to be within the Family Division's jurisdiction under MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), for certain criminal offenses, including felonies. Designated proceedings are based on petitions that allege violations of law described in MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1). MCL 712A.2d(1); MSA 27.3178(598.2d)(1). The act provides some special protections and rights to victims of juvenile offenses.\*

\*See Section 20.6, Note, for an explanation of the applicability of the adult Crime Victim's Rights Act to sentencing hearings.

### A. Right to Be Present Throughout Adjudication

The victim has the right to be present throughout the entire contested adjudication hearing, unless the victim is going to be called as a witness, in which case the court, for good cause shown, may order the victim to be sequestered until the victim first testifies. MCL 780.789; MSA 28.1287(789).

### B. Limitations on Identifying Testimony About Victims

If the victim has a reasonable apprehension of acts or threats of physical violence or intimidation by the juvenile or at the juvenile's direction against the victim or the victim's immediate family, the prosecuting attorney may move, or in the absence of a prosecuting attorney, the victim may request that the victim or any other witness not be compelled to testify at any court hearing for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion must be in camera. MCL 780.788; MSA 28.1287(788).

### C. Waiting Area for Victims

The court must provide a waiting area for the victim separate from the juvenile, the juvenile's relatives, and the juvenile's witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court must provide other safeguards to minimize the victim's contact with the juvenile, the juvenile's relatives, and the juvenile's witnesses during court proceedings. MCL 780.787; MSA 28.1287(787).

### D. Right to Copy of Adjudicative Order

MCL 780.799; MSA 28.1287(799), states that, if requested, a victim shall be provided with a certified copy of the order of an adjudicative hearing for purposes of obtaining relief under MCL 600.2913; MSA 27A.2913, which allows recovery of damages in a civil action against the parents of an unemancipated minor who has willfully or maliciously destroyed real or personal property or caused bodily harm or injury to another. See *McKinney v Caball*, 40 Mich App 389 (1972), and *Citizens*

*Ins Co v Lowery*, 159 Mich App 611 (1987). In designated proceedings, the “adjudicative order” is a judgment of conviction.

\*See Sections 20.19 (adult sentencing) and 12.7 (juvenile dispositions) for more detailed discussion of impact statements.

### E. Right to Make Impact Statement\*

The prosecuting attorney or the court, if requested by the victim, shall give to the victim notice of:

- (a) the offenses for which the juvenile was convicted;
- (b) the victim’s right to make a written or oral impact statement at a disposition hearing; and
- (c) the time and place of the disposition proceeding.

MCL 780.791(1)(a)–(c); MSA 28.1287(791)(1)(a)–(c).

## 18.22 Additional Orders and Notices

\*See Section 2.16 for a more detailed discussion of this requirement.

\*See Form MC 28.

\*See Section 4.10(A) for a list of “reportable juvenile offenses.”

### A. Notice to Courts With Prior Continuing Jurisdiction\*

Under MCL 712A.3a; MSA 27.3178(598.3a), where the child is subject to a prior or continuing order of any other court of this state, notice must be sent to such other court of any order subsequently entered under the juvenile code.\*

### B. Fingerprinting of Juveniles Adjudicated of “Reportable Juvenile Offenses”\*

Before the court enters an order of disposition on a reportable juvenile offense, the court must examine the confidential files to verify that the juvenile has been fingerprinted. If the juvenile has not been fingerprinted, the judge or referee must:

- (1) direct the juvenile to go to the law enforcement agency involved in the apprehension of the juvenile, or to the sheriff’s department, so fingerprints may be taken, or
- (2) issue an order to the sheriff’s department to apprehend the juvenile and take the juvenile’s fingerprints.

MCR 5.936(B)(1)–(2).

### C. Mandatory Testing for Venereal Diseases and AIDS\*

If a juvenile is convicted of a violation of any of several enumerated offenses, the court must order the juvenile to be examined or tested for venereal disease and hepatitis B infection and for the presence of HIV or an antibody to HIV. MCL 333.5129(4); MSA 14.15(5129)(4). The court must also order the juvenile to receive counseling regarding these diseases. MCL 333.5129(2); MSA 14.15(5129)(2).\*

\*See Section 4.13(B) for a list of covered offenses.

\*See Form MC 234.

### D. DNA Profiling\*

A juvenile convicted of one or more of several enumerated offenses must provide samples for chemical testing for DNA identification profiling or a determination of the sample's genetic markers and must provide samples for chemical testing for a determination of his or her secretor status. MCL 712A.18k(1); MSA 27.3178(598.18k)(1), and MCL 750.520m(1); MSA 28.788(13)(1).\*

\*See Section 4.12(A) for a list of covered offenses.

\*See Form MC 234.

### E. Sex Offenders Registration

If the juvenile is convicted of or placed on probation for a "listed offense," as defined in MCL 28.722; MSA 4.475(2), or an attempt or conspiracy to commit any "listed offense," the court or the Family Independence Agency shall register the juvenile or accept the juvenile's registration as provided in the Sex Offenders Registration Act, MCL 28.721 et seq.; MSA 4.475(1) et seq.\* MCL 712A.18(13); MSA 27.3178(598.18)(13), and MCL 28.722(a)(i); MSA 4.475(2)(i).

\*See Section 4.11.

